No. 20,843

In the United States Court of Appeals for the Ninth Circuit

TITLE INSURANCE AND TRUST COMPANY, EXECUTOR OF THE ESTATE OF LUDWIG G.B. ERB, DECEASED, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

On Appeal from the Judgment of the United States District Court for the Southern District of California

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BRIEF FOR THE APPELLEE

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BRIEF FOR THE APPELLEE

OPINION BELOW

The memorandum of decision of the District Court (I-B R. 166-178)[1] is officially reported at 245 F. Supp. 386. The District Court's findings of fact and conclusions of law in accordance with the momoran-

[1] "I-B R." references are to Section B of Volume I of the reproduced Transcript of Record on review, and "I-A R." references are to Section A of Volume I of the Transcript of Record.

dum of decision (I-B R. 195-203) are not officially reported.

JURISDICTION

This appeal involves federal estate taxes. The date of death was July 31, 1958. (I-B R. 196.) The taxes and interest in dispute were paid as follows: $90,000 on December 28, 1962 (I-B R. 200), and $20,224.75 (of which $17,555.17 represented interest), on February 18, 1963. (I-B R. 201.) Claim for refund was filed on November 12, 1963 (I-B R. 201), and was rejected on February 6, 1964 (I-B R. 201). Within the time provided in Section 6532 of the Internal Revenue Code of 1954, on September 28, 1964, the decedent's executor brought this action in the District Court for recovery of the tax and interest paid. (I-A R. 2-5.) Jurisdiction was conferred on the District Court by 28 U.S.C., Section 1346(a)(1). The judgment of the District Court was entered on January 13, 1966. (I-B R. 204.) Within sixty days thereafter, on February 11, 1966, a notice of appeal was filed. (I-B R. 207.) Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291.

QUESTION PRESENTED

The decedent bequeathed his residuary estate in trust with directions to the trustee to pay the income to his widow during her lifetime and, in its sole discretion, to use any part of the corpus "for expenses of accident, illness or other misfortune, or for any purpose whatsoever", and to pay any remaining

corpus (after intervening life estates to certain individuals) to named charities. The question is whether the District Court correctly held that the value of the charitable remainder as of the date of the decedent's death was not ascertainable by any reliable objective standard, and hence was not deductible for federal estate tax purposes under Section 2055(a) of the Internal Revenue Code of 1954, the applicable Treasury Regulations, and the controlling decisions of the Supreme Court.

STATUTES AND REGULATION INVOLVED

Internal Revenue Code of 1954:

> SEC. 2055. TRANSFERS FOR PUBLIC, CHARITABLE, AND RELIGIOUS USES.
>
> (a) *In General.*—For purposes of the tax imposed by section 2001, the value of the taxable estate shall be determined by deducting from the value of the gross estate the amount of all bequests, legacies, devices, or transfers (including the interest which falls into any such bequest, legacy, devise, or transfer as a result of an irrevocable disclaimer of a bequest, legacy, devise, transfer, or power, if the disclaimer is made before the date prescribed for the filing of the estate tax return)—
>
> * * * *
>
> (2) to or for use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty

to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation;

* * * *

For purposes of this subsection, the complete termination before the date prescribed for the filing of the estate tax return of a power to consume, invade, or appropriate property for the benefit of an individual before such power has been exercised by reason of the death of such individual or for any other reason shall be considered and deemed to be an irrevocable disclaimer with the same full force and effect as though he had filed such irrevocable disclaimer.

* * * *

(26 U.S.C. 1964 ed., Sec. 2055.)

Civil Code, 10 West's Annotated California Codes:

Sec. 2253. *Declaration of trust*

Declaration of trust. The nature, extent, and object of a trust are expressed in the declaration of trust.

Sec. 2254. *Declaration of trust; oral declarations; merger of previous declarations into written declaration*

Same. All declarations of a trustor to his trustees, in relation to the trust, before its acceptance by the trustees, or any of them, are to be deemed part of the declaration of the trust, except that when a declaration of trust is made

in writing, all previous declarations by the same trustor are merged therein.

Treasury Regulations on Estate Tax (1954 Code):

Sec. 20.2055-2 *Transfers not exclusively for charitable purposes.*

(a) *Remainders and similar interests.* If a trust is created or property is transferred for both a charitable and a private purpose, deduction may be taken of the value of the charitable beneficial interest only insofar as that interest is presently ascertainable, and hence severable from the non-charitable interest. The present value of a remainder or other deferred payment to be made for a charitable purpose is to be determined in accordance with the rules stated in § 20.2031-7. Thus, if money or property is placed in trust to pay the income to an individual during his life, or for a term of years, and then to pay the principal to a charitable organization, the present value of the remainder is deductible. To determine the present value of such remainder use the appropriate factor from column 4 of Table I or Table II of § 20.2031-7, whichever is applicable. If the interest transferred is such that its value is to be determined by a special computation (see paragraph (e) of § 20.2031-7), a request for a specific factor, accompanied by a statement of the date of birth of each person the duration of whose life may affect the value of the remainder, and by copies of the relevant instruments, may be submitted by the executor to the Commissioner who may, if conditions permit, supply the factor requested. If the Commissioner does not furnish the factor, the claim

for deduction must be supported by a full statement of the computation of the present value made in accordance with the principles set forth in the applicable paragraph of § 20.2031-7.

* * * *

(26 C.F.R., Sec. 20.2055-2.)

STATEMENT

The material facts of this estate tax case are not disputed, and may be briefly summarized as follows:

Ludwig G.B. Erb (hereafter sometimes referred to as "decedent") died testate on July 31, 1958, at the age of 82. Decedent was survived by his widow, Emma Erb, who was 82 years old at the date of the decedent's death. The decedent had no children. (I-B R. 196.)

Decedent's will, which was duly probated in the Superior Court of Los Angeles County, named the Title Insurance and Trust Company as his executor. (I-B R. 196.) The executor will hereafter sometimes be referred to as "the bank".

Decedent's will, dated December 28, 1954, bequeathed the residue of his estate to the bank to be held by it as trustee under an inter vivos trust set up by decedent in April, 1942, for the uses and upon the terms specified in the inter vivos trust, as amended. (I-B R. 199.)

The inter vivos trust created by decedent in 1942 provided, in general, that the trust's income was to be paid to decedent during his life, and to Emma, his widow, should she survive him. Upon the death of

both decedent and Emma, after certain distributions from corpus, the income from the remaining corpus was to be distributed to certain named individuals, and, upon the death of such persons, the trust was to terminate and the corpus then existing was to be divided between six specified charitable institutions. (I-B R. 197.)

The inter vivos trust contained a provision whereby the trustee was authorized to invade the trust corpus on behalf of the decedent during his life, or his widow following his death. (I-B R. 197-198.) That provision, which is the basis of the present law suit, was amended on January 4, 1955 (three and a half years before decedent's death) to read as follows (I-B R. 198):

> If at any time or times during the life of this trust, the Trustor—and after his death, the said EMMA ERB, if she shall survive him—shall be in want of additional moneys for reasonable support, care and comfort, or for expenses of accident, illness or other misfortune, or for any purpose whatsoever, whether included in the foregoing classification or not; in such case of want or need, it shall be the duty of the Trustee, in its sole uncontrolled discretion, to pay to or to use or to apply or to expend for the said Trustor or EMMA ERB, his said wife, as the case may be, such portion or portions of the corpus of this trust estate, up to and including the whole thereof, as the Trustee may deem necessary to meet such want.

Pursuant to decedent's will, the residue of his estate was distributed to the inter vivos trust. This

residue was worth somewhat more than $705,000.00. (I-B R. 199.)

Emma Erb was a person of considerable personal means; her separate property yielded her an income ranging from a low of $26,190.87 in 1959 to a high of $36,080.95 for the eight-month period ending with her death on August 31, 1962. She was a person of modest tastes and frugal spending habits. She owned no valuable jewelry, and owned one $200 fur jacket. During the 49-month period in which she survived decedent, Emma saved $116,507.64 of her own separate income and income from the inter vivos trust, and spent $81,037.57. (I-B R. 199.) During that 49-month period there were no invasions of corpus on Emma's behalf, and the trustee's power to invade corpus terminated at her death. (I-B R. 200.)

On the decedent's federal estate tax return, timely filed on October 20, 1959, the bank claimed a charitable deduction for the value of the six charitable remainder interests in the amount of $297,562.71. This claimed deduction was disallowed, and a deficiency in federal estate tax of $92,669.58 was asserted. (I-B R. 200.) The deficiency (with interest) was then paid, and the bank filed a timely refund claim. Upon rejection of the refund claim the bank brought a timely suit for refund in the District Court (I-B R. 201.)

The case was pre-tried before Judge Harry C. Westover, and the Government then moved for summary judgment. (I-A R. 77.) The motion was opposed by the bank, with both sides filing extensive briefs. (I-A R. 79-91; I-A R. 96-100; I-B R. 101-

142.) The Government's motion was granted, with Judge Westover ruling in a memorandum of decision. (I-B R. 166-178.) Proposed findings of fact and conclusions of law in accordance with the memorandum of decision were prepared by both parties, and, after a hearing, findings of fact and conclusions of law were entered by the trial judge. (I-B R. 195-203.) Judgment was entered in favor of the Government on January 13, 1966 (I-B R. 204), and the bank then took this timely appeal.

SUMMARY OF ARGUMENT

The decedent in an inter vivos trust, through which the residue of his estate was to be administered, authorized his trustee in its sole uncontrolled discretion to invade the charitable remainders "for reasonable support, care and comfort, or for expenses of accident, illness or other misfortune, or for any purpose whatsoever, whether included in the foregoing classification or not" of his widow, the life beneficiary. Since the extent to which the charitable remainders might be diverted on behalf of the widow under this power of invasion was not susceptible of prediction by any reliable objective standard, the remainders had no ascertainable value as of decedent's death and accordingly were not deductible for federal estate tax purposes. No tenable distinction can be drawn between this case and *Henslee* v. *Union Planters Bank*, 335 U.S. 595, and *Merchants Bank* v. *Commissioner*, 320 U.S. 256, where the Supreme Court held that discretionary powers of the trustees to invade for more

limited purposes on behalf of the widow sufficed *per se* to defeat valuation and deduction of the charitable remainders because the existence of such powers injected elements of speculation too great to be overcome, notwithstanding the facts that the widow's previous manner of living was modest and her resources substantial. So too, in the present case, the widow's economical living habits and independent means could have no more relevancy than in *Merchants Bank* v. *Commissioner, supra,* or *Henslee* v. *Union Planters Bank, supra.*

These Supreme Court decisions have been followed in cases where the discretionary power to invade was even more restricted than that involved here. Furthermore, the California courts would not interfere with the trustee's discretionary power to invade, nor limit it to a more rigid standard, because to do so would disregard the plain language of the trust instrument and substitute the court's discretion for that of the trustee.

Under these circumstances, the District Court correctly held that the value of the charitable remainders failed to qualify for the charitable deduction, and its decision should be affirmed.

ARGUMENT

The District Court Correctly Held That the Trustee's Power to Invade Principal Was Not Limited by an Ascertainable Standard Capable of Being Stated in Definite Terms of Money, and That the Remainder Gifts to Charity Were Accordingly Ineligible for the Charitable Deduction Allowed by Section 2055(a) of the Internal Revenue Code of 1954

The factual background of this estate tax case is undisputed. The sole issue is whether the value of remainder interests in a trust of the decedent's residuary estate qualifies for the deduction allowed for charitable bequests by Section 2055(a) of the 1954 Code, *supra*, and the applicable Treasury Regulations.

Section 2055(a) of the 1954 Code provides for the deduction from the gross estate of a decedent of the amount of all bequests to or for the use of qualified charities. While there is no question in this case that there was a bequest in trust for qualified charities, nevertheless the issue arises as to whether the amount of the bequests was sufficiently ascertainable at the date of the decedent's death to permit the deduction. In this connection, the long standing applicable regulation (Treasury Regulations on Estate Tax (1954 Code), Section 20.2055-2(a), *supra*) provides that if a trust is created for both a charitable and a private purpose, deduction may be taken for the value of the charitable beneficial interest only insofar as that interest is presently ascertainable, and hence severable from the non-charitable interest. It is the position of the Government, sustained by the court below, that the value of the charitable beneficial

interest bequeathed by the decedent was not ascertainable at the date of the decedent's death within the meaning of the Code and the Regulations, and the controlling Supreme Court decisions, and therefore the claimed deduction must be denied.

The reason why the value of the charitable remainders could not be determined as of the date of decedent's death is that he gave his trustee extremely broad powers to invade principal in favor of his widow, the life beneficiary, and the purposes for which the widow could and might wish to have the funds spent did not lend themselves to reliable prediction. In other words, there was no ascertainable standard provided for in the trust instrument by which to determine the extent of the trustee's power to invade corpus of the trust for the decedent's widow. See *Merchants Bank* v. *Commissioner*, 320 U.S. 256; *Henslee* v. *Union Planters Bank*, 335 U.S. 595; cf. *Ithaca Trust Co.* v. *United States*, 279 U.S. 151.

Decedent's will provided that his residuary estate was to be poured over into an inter vivos trust which he had created 16 years before his death. His widow, Emma, was to receive the trust's income for her life, and at her death the corpus of the trust was to be distributed in part to other individuals and upon the termination of life estates for certain named individuals the balance of the corpus was to be paid over to six charitable institutions. The pertinent provision of the trust is Section Six, which was amended about 3½ years before decedent's death to read as follows (I-B R. 198):

> If at any time or times during the life of this trust, the Trustor—and after his death the said EMMA ERB, if she shall survive him—shall be in want of additional moneys for reasonable support, care and comfort, *or for expenses of accident, illness or other misfortune, or for any purpose whatsoever, whether included in the foregoing classification or not;* in such case of want or need it shall be the *duty of the Trustee, in its sole uncontrolled discretion* to pay to or use or apply or to expend for the said Trustor or EMMA ERB, his said wife, as the case may be, *such portion or portions of the corpus of this trust estate, up to and including the whole thereof, as the Trustee may deem necessary to meet such want.* (Emphasis supplied.)

We submit that the above language of the trust instrument provides such broad standards for invasion of corpus as to make it impossible to determine, as of the decedent's death, the amounts, if any, which the charities would receive. The Supreme Court has explicitly held that no charitable deduction is allowable for bequests which may never reach charity, and that "Where the principal of a bequest to charity thus may be invaded for private purposes, it is only the ascertainable and assured balance of the bequest to charity that is recognized for a tax deduction." *Commissioner* v. *Sternberger's Estate*, 348 U.S. 187, 194. See also *Henslee* v. *Union Planters Bank, supra; Merchants Bank* v. *Commissioner, supra.*

A claimed charitable deduction of a remainder interest must pass two tests to be allowable. First, al-

though the possibility of actual invasion of corpus may be remote, it must be clear from the governing instrument that there is an ascertainable standard for invasion of corpus. Second, the extent of possible invasion must be measured in terms of money. Thus, in Paul, Federal Estate and Gift Taxation (1946 Supp.) pp. 436-437, the author states the governing rules as follows:

> Analysis of these invasion cases would be materially facilitated if two basic propositions were respected. First, if the power of invasion is not measurable in terms of an ascertainable standard, the deduction should fail regardless of any question of remoteness or imminence of invasion. This is the message of the Merchants National Bank case. Second, if some standard is ascertainable, the extent of possible invasion should be determined, and the residue allowed as a deduction. In short, the lack of remoteness should not necessarily bar the deduction *in toto*. Exact computation in each case is, of course, out of the question. While tax law at times satisfies itself with "a rough estimate" and "an approximation derived from the evaluation of elements not easily measured", the Supreme Court apparently requires a greater degree of accuracy for purposes of the charitable deduction. These two propositions obviously leave open the critical question whether the life tenant's claim to principal is confined by some ascertainable standard. And at this point the only generality that one can offer is that no ready touchstone is available which conveniently reveals the answer. There is no limit to the imagination of draftsmen and such

words as "happiness", "need", "welfare", and "desire" must be read with a close eye to the background. But the Government may fairly assert that he who claims an ascertainable standard should produce "clear and convincing proof" that local law enforces such a standard. Although Congress has generously granted a deduction, it is not too much to ask that the estate clearly establish its right thereto.

See, also, 4 Mertens, Law of Federal Gift and Estate Taxation (1959), pp. 397-398, where the author says:

> Where receipt by the charity of its interest is subject to a power of invasion for the benefit of private persons, the determination as to whether any portion of such interest is assured is controlled primarily by two subordinate tests: (1) whether by the terms of the trust or other instrument of transfer the trustee's or beneficiary's power of invasion is limited by definite and ascertainable fixed standards capable of being stated in terms of money (such standard must, in the first instance, be determined by reference to the will); and (2) whether the extent of anticipated invasions, as of the time of the transfer in trust, and the effect thereof on the present value of the power of invasion, under the circumstances, is clearly demonstrable. The second requirement cannot stand independently of the first; if there is not a qualifying fixed standard the deduction is not allowed irrespective of the probability or improbability of actual invasion for private use. Conversely, once the fixed standard is established, the second test will show whether it is possible to factually establish the

> portion which is assured to the charity as free from the contingency of invasion for private use.

And see, Lowndes and Kramer, Federal Estate and Gift Taxes (1962 ed.), p. 483; Note, Deduction of a Charitable Remainder, 41 Va. L. Rev. 635, 648 (1955); *Merchants Bank* v. *Commissioner*, *supra*, pp. 261-263; *Henslee* v. *Union Planters Bank*, *supra*, pp. 599-600.

In short, the first test which a claim for a charitable deduction for a remainder interest must pass is that of determining whether the supervening power to invade corpus is sufficiently limited by an ascertainable standard as to make the remainder severable from the private life estate. A bequest which passes this test assures that the charity will take *something*, but this does not establish *how much* the charity will ultimately receive. That latter question brings the second test into play; if the standard for invasion is ascertainable, what are the chances of invasion actually occurring? If the power to invade does not pass the first test (ascertainable standard), the second test (determination of amount) is never reached. *Merchants Bank* v. *Commissioner*, *supra*; *Newton Trust Co.* v. *Commissioner*, 160 F. 2d 175, 178-180 (C.A. 1st, 1947); *Merrill Trust Co.* v. *United States*, 167 F. Supp. 474 (D. Me., 1958).

The law has now become well-settled that it is the existence of the power to invade corpus, and not the likelihood of its exercise, which governs. The Supreme Court phrased the rule thus in *Henslee* v. *Union Planters Bank*, *supra*, p. 599:

> But, though there may have been little chance of that extravagance which would waste a part or consume the whole of the charitable interest, that chance remained. What common experience might regard as remote in the generality of cases may nonetheless be beyond the realm of precise prediction in the single instance.

The bequest in that case (p. 596) allowed the trustees "to use and expend in their discretion any portion of my estate, either income or principal, for the pleasure, comfort and welfare of my mother." The decedent's mother was 85 years old at the time of his death, had no dependents, lived moderately, and died three years after her son without ever seeking to invade corpus. She had a private income of $3,600 per year, and the trust set up by decedent to pay her $9,000 per annum in fact earned $15,000 per annum. Although the Supreme Court recognized that on these facts the likelihood of actual invasion of corpus was very small, the charitable deduction was denied because there was no ascertainable standard set forth to govern invasion of corpus and the charitable remainder was not severable from the private life estate. The rule of that case is, we submit, equally applicable and controlling here.

The issue in the present case is thus narrowed to the question of whether the terms of Section Six of decedent's trust supplied an ascertainable standard governing the trustee's power to invade corpus which was capable of being stated in terms of money. There is no real dispute here that actual invasion of the corpus was unlikely, considering Mrs. Erb's age, pri-

vate income and modest personal living habits,[2] but that goes to the second test of amount; we submit that before ever reaching an inquiry as to the likelihood of invasion the ascertainable standard must be present, and Section Six manifestly contains no such standard.

The critical language of Section Six is that which allows the trustee, in its sole uncontrolled discretion, to expend up to the entire amount of the corpus of the trust "for reasonable support, care and comfort, or for expenses of accident, illness or other misfortune, or for any purpose whatsoever, whether included in the foregoing classification or not". This language is clear and unambiguous; it conveys an exceptionally broad power of invasion. When it is contrasted with trust language which has been held to supply an ascertainable standard in other cases, it becomes readily apparent that it fails to meet the first test for deductibility.

In *Ithaca Trust Co.* v. *United States*, *supra*, p. 154, the trust provided that corpus could be invaded for any sum "necessary to suitably maintain her [the life beneficiary] in as much comfort as she now enjoys." This, the Supreme Court held (p. 154), created an ascertainable standard, being "fixed in fact and capable of being stated in definite terms of money." Notwithstanding the obvious disparity between the language of Section Six of decedent's trust and that of the *Ithaca Trust* case, it is apparent that the affida-

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[2] See Finding of Fact XII (I-B R. 199) of the court below as to Emma's Resources and living habits.

vits of decedent's attorney and the trust officer to the effect that Section Six was meant to allow invasion only to maintain Mrs. Erb's living standard (I-B R. 143-146, 150-151) are simply after-the-fact attempts to fit the language of Section Six within the rubric of the *Ithaca Trust* holding.[3]

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[3] Other cases in which an ascertainable standard limiting invasion of corpus has been found include *Hartford-Connecticut Trust Co.* v. *Eaton,* 36 F. 2d 710 (C.A. 2d, 1929), where corpus could be invaded for amounts the trustee "may deem necessary or advisable for * * * [the life beneficiary's] comfortable maintenance and support" (p. 710); *Lucas* v. *Mercantile Trust Co.,* 43 F. 2d 39 (C.A. 8th, 1930), where invasion was authorized for amounts "necessary for the comfort, maintenance and support" of the life beneficiary (p. 40); *Berry* v. *Kuhl,* 174 F. 2d 565 (C.A. 7th, 1949), in which the will allowed invasion of corpus (up to $5,000 per year) "If by reason of accident, illness or other cause * * * [the life beneficiary] requires funds for this treatment, support or maintenance * * *" (p. 566); *Lincoln Rochester Trust Co.* v. *McGowan,* 217 F. 2d 287 (C.A. 2d, 1954), where corpus would be invaded for such sums "as * * * may be necessary to meet any unusual demands, emergencies, requirements or expenses for * * * [the life beneficiary's] personal needs", and the will further provided, "This clause is intended to provide for emergencies arising from sickness, accident or failure of investments" (p. 289). In *Bowers* v. *South Carolina National Bank of Greenville,* 228 F. 2d 4 (C.A. 4th, 1955), the will allowed corpus to be expended to pay all expenses of keeping up a house and all necessary medical and hospital expenses of the beneficiary; this was held to be an ascertainable standard, as was the language involved in *United States* v. *Powell,* 307 F. 2d 821 (C.A. 10th, 1962), wherein the trust authorized invasion of principal for the "maintenance, welfare, comfort, or happiness" of the grantor's wife or daughters. In the *Powell* case, supra, the Court of Appeals held that under applicable local law (that of Kansas), "happiness" was synonymous with "welfare" and "comfort", and this would be a fixed standard under *Ithaca Trust, supra.*

In *Merchants Bank* v. *Commissioner*, *supra*, p. 258, the testator bequeathed the corpus of a testamentary trust to charities and empowered the trustee in its discretion to invade the corpus "for the comfort, support, maintenance, and/or happiness" of the life beneficiary, his widow. The Supreme Court sustained the long-standing Treasury Regulations *(supra)* which provide that a charitable bequest is deductible only in so far as it has a "presently ascertainable" value as of the testator's death. Distinguishing *Ithaca Trust*, it held that the extent to which the charitable remainder might be diverted to the widow was not measurable by any reliable objective standard. The mere existence of the invasionary power sufficed to defeat the deduction because (320 U.S. p. 263) "Introducing the element of the widow's happiness * * * brought into the calculation elements of speculation too large to be overcome, notwithstanding the widow's previous mode of life was modest and her own resources substantial."

The test applied by the Supreme Court in *Merchants Bank* was the same as that underlying its decision in *Ithaca Trust;* the difference in result stemmed from a vital difference in the nature of the invasionary power.

In *Union Planters Bank*, the Supreme Court, on the authority of its *Merchants Bank* decision, held (p. 596) that the power of the trustees to invade the corpus of the trust for the "pleasure, comfort and welfare" of the life beneficiary, the testator's mother, precluded deduction of the charitable remainder not-

withstanding the unlikelihood of the exercise of the invasionary power.

The charitable remainder in this case was no more susceptible of reliable measurement than those denied deduction by the Supreme Court in the *Merchants Bank* and *Union Planters Bank* cases. Indeed, the instant case presents an *a fortiori* situation for denial of the deduction, since the invasionary power which the decedent here granted to the trustee ("for any purpose whatsoever") was even broader than the powers involved in those cases.

The two cases decided by this Court which the bank here emphasizes in its brief (pp. 20-24), involved invasionary powers very different from those granted in Section Six of decedent's trust in issue here. Thus in *Commissioner* v. *Bank of America, Etc.*, 133 F. 2d 753 (C.A. 9th, 1943), the trustee was authorized to invade corpus for the beneficiary "in case she should, by reason of accident, illness, or other unusual circumstances so require", and the trustee's power was further restricted to "such additional sum or sums as in the judgment of said trustee may be necessary and reasonable under the existing conditions." This case was shortly followed by *Commissioner* v. *Wells Fargo B. & U. Tr. Co.*, 145 F. 2d 130 (C.A. 9th, 1944), where corpus could be used by the trustee to assist the beneficiary in case of need "on account of any sickness, accident, want or other emergency."

The most important fact about the *Wells Fargo* and *Bank of America* cases, *supra*, however, is that they were both decided before the Supreme Court de-

cided *Henslee* v. *Union Planters Bank, supra.* The *Bank of America* case was decided in 1943, and the *Wells Fargo* case in 1944; *Henslee* v. *Union Planters Bank* was decided in 1948, and *Merchants Bank* v. *Commissioner*, which it followed, was decided in 1943.

It is apparent that the invasionary powers contained in Section Six of the Erb trust are far more sweeping and far less restrictive than those which have previously failed the ascertainable standard test. In *Henslee* v. *Union Planters Bank, supra*, a power to invade for the "pleasure, comfort and welfare" of the life beneficiary was held insufficiently ascertainable. In *Merchants Bank* v. *Commissioner, supra*, p. 30 invasionary power for the "comfort, support, maintenance, and/or happiness" of the life beneficiary was also held insufficiently ascertainable. In *Gammons* v. *Hassett*, 121 F. 2d 229, 230 (C.A. 1st, 1941), certiorari denied, 314 U.S. 673, corpus could be invaded "as my said wife may at any time and from time to time need or desire"; this failed the ascertainable standard test, as did the language of *Newton Trust Co.* v. *Commissioner, supra*, where corpus could be expended for the beneficiary's "use and benefit". This was also the result in *Zentmayer's Estate* v. *Commissioner*, 336 F. 2d 488 (C.A. 3d, 1964), where (p. 489) the corpus could be spent "for the purpose of the support, the maintenance, the welfare and comfort of * * * [the beneficiary], and for any other purpose which * * * [the] trustees shall deem expedient, necessary or desirable for the benefit or use of * * * [the beneficiary]." Again, in *De Castro's Estate* v. *Commissioner*, 155 F. 2d 254 (C.A.

2d, 1946), the Second Circuit found the standard too vague where (p. 255) corpus could be invaded "if, during the life of my wife * * * due to her illness, accident or other unforseen emergency, the income of the two (2) trusts shall not be sufficient to amply provide for her needs". See also *Merrill Trust Co.* v. *United States, supra.*

A comparison of the language of Section Six of the Erb trust, authorizing invasion of corpus for "reasonable support, care and comfort, or for expenses of accident, illness or other misfortune, or for any purpose whatsoever, whether included in the foregoing classification or not", with that presented in *State Street Bank & Trust Co.* v. *United States*, 313 F. 2d 29 (C.A. 1st, 1963), likewise compels the conclusion that Section Six sets forth no ascertainable standard. In that case (p. 29), invasion was authorized for the beneficiary's "comfortable support and maintenance and for any other reasonable requirement." The Court of Appeals held (p. 31) that the "any other reasonable requirement" language rendered the standard unascertainable; it "authorized the trustees to provide something more; to wit, a higher—and hence immeasurable—standard."

Language strikingly similar to that of Section Six was considered in *James* v. *Commissioner*, 40 T.C. 494 (1963). There the will authorized the trustees to pay any part of the trust corpus (p. 496) "for the account of any beneficiary either for comfortable maintenance and support, for educational requirements, illness, operations, or for any reason whatsoever

which shall to my Trustees, in their sole discretion, seem sufficient." The Tax Court held the power of invasion to be so broad, and so far in excess of maintenance of the beneficiary's prior living standard, as not to constitute an ascertainable standard. It rejected the taxpayer's contention that "any reason whatsoever" was limited by the preceding specific terms. The bank in the present case makes precisely the same argument (Br. 36), which should also be rejected here. See also *Marine Trust Co. of Western New York* v. *United States*, 247 F. Supp. 278, 280 (W.D. N.Y., 1965). Indeed, in the present case this result follows *a fortiori*, because Section Six explicitly provides that invasion could be made for "any purpose whatsoever, whether included in the foregoing classification or not". The language chosen by decedent could scarcely have been clearer.

Other arguments advanced by the bank in an effort to construe the language of Section Six as supplying an ascertainable standard are equally untenable. In the first place, the fact that the invasion of corpus was to be exercised in a fiduciary capacity by a corporate trustee does not somehow confer ascertainability on the power to invade; in almost all the cases on the subject the power to invade was exercisable by a fiduciary, whose standing as such does not create an ascertainable standard where none existed under the instrument. *Strite* v. *McGinnes*, 215 F. Supp. 513, 515-516 (E.D. Pa., 1963). Further, the trust officer who averred that he would not have invaded corpus except to maintain Mrs. Erb's standard of living

would have been acting in conflict with the express terms of the trust, and it is the law in California that a trust created by a written instrument cannot be varied by subsequent declarations of the trustee. *Bowling* v. *Newlands*, 112 Cal. 476, 44 Pac. 810 (1896). By the same token, there is no merit to the bank's contention that the meaning of Section Six as it now stands, following its amendment in 1955, can be altered by referring back to its original provisions. (Br. 31-33.) The California Civil Code, in Section 2254, *supra*, states explicitly that "when a declaration of trust is made in writing, all previous declarations by the same trustor are merged therein."

Finally, the bank argues at length that, under California law, the power here to invade corpus would be restricted to amounts needed to support Mrs. Erb in her accustomed manner, and that this power would have to be exercised in the light of her other available income from non-trust sources. (Br. 25-36.) California law, however, does not support these contentions. In the first place, although a trust for the benefit of third persons may be created in California for any purpose for which a contract may be made (California Civil Code, Section 2220), that rule has no relevance to the narrow issue raised here. The case of *Ringrose* v. *Gleadall*, 17 Cal. App. 664, 667 (1911), cited by the bank (Br. 32) for the proposition that the trust here must be construed under principles of contract law, recites this proposition as mere *obiter dictum*—and no California case has been found in which it has been repeated. Indeed, the

holding of the *Ringrose* case is that nothing can be read into a trust instrument not already there. We submit that in the present case the California courts would determine the decedent's intent from the four corners of the trust instrument alone—not from after-the-fact affidavits of attorneys or trust officers, or from the superseded terms of previous trust provisions. California Civil Code, Sections 2253, 2254, *supra; Lombardi* v. *Blois*, 230 Cal. App. 2d 191, 40 Cal. Rptr. 899 (1964); *Estate of Patten*, 217 Cal. App. 2d 167, 31 Cal. Rptr. 767 (1963); *Warner Estate*, 183 Cal. App. 2d 846, 7 Cal. Rptr. 319 (1960); *Heifetz* v. *Bank of America*, 147 Cal. App. 2d 776, 305 P. 2d 979 (1957); *Union Nat. Bank* v. *Hunter*, 93 Cal. App. 2d 669, 209 P. 2d 621 (1949); *Security First Nat. Bank* v. *Wellslager*, 88 Cal. App. 2d 210, 198 P. 2d 700 (1948); *Smith* v. *Bank of America, Etc. Assn.*, 14 Cal. App. 2d 78, 57 P. 2d 1363 (1936). The terms of Section Six of decedent's trust impose no restriction on invasion of corpus limiting such invasion to amounts needed to maintain Mrs. Erb's standard of living, and the California Courts would not engraft such a restriction thereon. As the California Supreme Court made clear in *Moxley* v. *Title Ins. & Trust Co.*, 27 Cal. 2d 457, 463, 165 P. 2d 15, 18 (1945):

> It is axiomatic that we must look to the instrument creating the trust to determine the nature, extent and object of said trust.

Contrary to the bank's assertion (Br. 26, 34-35), we do not maintain that the trustee here has *carte*

blanche to invade corpus for any whim of the beneficiary, or for patently unreasonable purposes. The California courts do not allow a trustee to exercise a wholly unlimited discretion, or an arbitrary one; a trustee must, ordinarily, exercise a "reasonable judgment". This means, primarily, that the trustee must adhere to the standards set up by the trustor, and act to effectuate the trustor's purpose in creating the trust—looking principally at the trust document itself to determine the trustee's rights. *Estate of Miller*, 230 Cal. App. 2d 888, 907-909, 41 Cal. Rptr. 410 (1964). However, where—as here—the trustee may invade corpus in its "sole uncontrolled discretion", even the "reasonable judgment" standard has been waived by the trustor. As was held in *Coberly* v. *Superior Court*, 231 Cal. App. 2d 685, 689, 42 Cal. Rptr. 64, 66 (1965):

> A grant of absolute discretion to a trustee to administer assets does not mean it can do as it pleases, but rather that the grantor has waived the requirement that the conduct of the trustee at all times satisfy the standard of judgment and care exercised by a reasonable, prudent man.
> * * *

In addition, the bank maintains that California law would not permit invasion of corpus for Mrs. Erb unless her other available income proved inadequate to meet her needs. (Br. 29-30.) Since Mrs. Erb was a person of substantial personal wealth, the bank in substance argues that this outside income makes the standard of invasion set forth in Section

Six an ascertainable one. The California law on this point, however, hinges on the factual question of whether the trustor intended to make a gift to the beneficiary regardless of the beneficiary's other means. Thus in *Estate of Ferrall*, 41 Cal. 2d 166, 176, 259 P. 2d 1009, 1014 (1953), where invasion of corpus was permitted "to meet the needs" of the life beneficiary, the Court held that the trustee should consider such needs "unless the language of the trust instrument affirmatively reveals an intention to make a gift * * * regardless of the beneficiary's other means".

In the present case the trustee not only had power to invade corpus under a standard far broader than "to meet the needs" of the beneficiary, but the trust instrument affirmatively reveals an intention to benefit Mrs. Erb without regard to her personal resources. Moreover, cases of the *Ferrall* type are poor vehicles from which to draw general principles or arbitrary rules. See, for example, the exhaustive survey of this area in Halbach, Problems of Discretion in Discretionary Trusts, 61 Colum. L. Rev. 1425, 1442-1449 (1961). The author characterizes the facts in the *Ferrall* case as "easy" (p. 1431, fn. 36); the facts of the present case are quite different. In any event, if the bank took the position in a state court proceeding that it did not have power to invade corpus if Mrs. Erb's outside income was adequate for the purpose at hand, it would have to overcome the rule of the Restatement of Trusts (Second), Section 128, comment (e) (1959), which provides:

> It is a question of interpretation whether the beneficiary is entitled to support out of the trust fund even though he has other resources. The inference is that he is so entitled.

The case of *Di Maria* v. *Bank of California*, 237 Cal. App. 2d 327 (1965), cited by the bank (Br. 30), is completely inapplicable here. In the *Di Maria* case (p. 329, fn. 1) invasion of corpus was authorized for the beneficiary's "reasonable support, medical care and comfort", and invasion was to be based on "income which the Trustor has from other sources" as well as trust income both being insufficient. Perhaps the most that can be said for the bank's argument on this facet of the case is that it might be able to convince a California court that it should not invade corpus until Mrs. Erb's other income was at least jeopardized—but that will not do insofar as supplying the ascertainable standard for purposes of a federal estate tax deduction. *Merchants Bank* v. *Commissioner*, *supra*; *Henslee* v. *Union Planters Bank*, *supra*.

It is difficult to perceive the point of the bank's contention (Br. 28) that decedent's concern for the charitable remaindermen was so great that he voluntarily eschewed the marital deduction rather than give his widow a power of appointment over one-half of his residuary estate. If Ludwig Erb's sentiments for the charities were strong enough, he could simply have made outright bequests to them—and this litigation would never have arisen. All that the bank's argument proves is that decedent cared neither for

the marital nor the charitable deductions afforded by the federal estate tax law; he wanted to have his will (and trust) drawn his way, so as to benefit his wife —even to the extent of authorizing provision of the trust corpus for her benefit "for any purpose whatsoever"—and tax-saving considerations were apparently secondary. (See, for example, the affidavit of decedent's attorney as to his client's sentiments about tax-saving suggestions (I-B R. 143-145; Br. 6-7).)

Finally, the bank argues that invasion to maintain Emma's accustomed standard of living would constitute an ascertainable standard. (Br. 37-40.) We have no quarrel with the proposition, drawn as it is from many of the cases discussed *supra*. The important point for purposes of the present case is that invasion of corpus under Section Six of decedent's trust was not limited to maintaining Emma's living standard, nor would local law so limit invasion. The bank's argument chooses to ignore the language of the trust itself, and the instrument leaves little room for doubt but that decedent wanted the trustee to invade corpus if necessary to satisfy any reasonable desire his widow might have. There is no adequate basis whatever to assume that he would restrict her in any way to enhance his charitable contributions, which were obviously less important to him than the interests of his widow.

The bank's Conclusion (Br. 41-43) constitutes an *ad hominem* attack on the Government, and merits no response. At any rate, the Supreme Court, in *Henslee* v. *Union Planters Bank*, *supra*, p. 600, has

explicitly disposed of the contention that because invasion did not in fact occur the standard for invasion was ascertainable at the date of decedent's death:

> Nor do we think it significant that the trust corpus was intact at the mother's death, for the test of present ascertainability of the ultimate charitable interest is applied "at the death of the testator". *Ibid.* The charitable deduction is a matter of congressional grace, and it is for Congress to determine the advisability of permitting amendment of estate tax returns at such time as the probable vesting of the charitable interest has reduced itself to unalterable fact.

CONCLUSION

The District Court's decision is correct, and should be affirmed.

Respectfully submitted,

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Certificate

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated: _____ day of _____, 1966.

_____

Attorney

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